IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DAN LOTT,	*Plaintiff in Error,*	
	vs.	No. 2201.
UNITED STATES OF AMERICA,	*Defendant in Error.*	

Brief of Plaintiff in Error

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STATEMENT OF THE CASE.

Writ of Error to the United States District Court for the District of Alaska, Division No. 1, upon a Judgment of Conviction and Sentence, upon Affidavit and Complaint, charging that defendant, Dan Lott, an Indian, *incited another to commit a crime*—to-wit the crime of *furnishing liquor to an Indian;* under Sec. 142 of the Alaska Criminal Code.

The Complaint was originally made and filed in the Commisioner's Court, at Ketchikan, Alaska, where the defendant was found guilty, and by sen-

tence of the Commissioner fined $50.00 and costs; subsequently, upon an appeal from the Commissioner's Court, the matter was brought on, *de novo,* in the District Court, where defendant was again found guilty, and this time fined $75.00 without costs.

A demurrer was interposed to the Complaint on the ground that the facts set forth in the Complaint did not constitute a crime under the laws applicable to the Territory of Alaska, which was overruled.

A motion to set aside the verdict, for a new trial and in arrest of judgment, was made in the District Court, after the verdict, which motion was overruled.

On May 17th, 1912, a Petition for Writ of Error was duly filed, and an Order was signed by the Judge of the District Court allowing a Writ of Error; and on the same day an Appeal Bond was duly approved and filed; also on the same day the Assignment of Errors was duly filed; and on October 16th, 1912, a Writ of Error was duly allowed, issued and filed, and a Citation with admission of service, was duly issued and filed.

ASSIGNMENTS OF ERROR.

There are but two Assignments of Error, and they go to assigning error upon the overruling of defendant's demurrer, on the ground that the facts stated in the Complaint did not constitute a crime:

Assignment No. 1.

That Sec. 218, Alaska Criminal Code, Part I, does not create common law crimes; that the common law of England does not apply to Alaska in so far as to create common law crimes not expressly designated by law.

Assignment No. 2.

That solicitation by an Indian to purchase intoxicating liquor does not constitute a crime under Sec. 142 of the Alaska Criminal Code, nor under any law.

BRIEF OF THE ARGUMENT.

I.

Soliciting Another to Commit a Crime, Not Offence Under Sec. 142.

The conviction was had under Sec. 142 of the Alaska Criminal Code, PROHIBITING THE SALE OF LIQUOR TO INDIANS.

The complaint does not charge the commission of that crime; but that defendant *incited another to commit* that crime.

Dan Lott is an Indian, and the Complaint charges that he *solicited the liquor for himself.*

A demurrer was duly interposed on the ground that the facts stated in the Complaint did not constitute a crime under the laws applicable to the Territory of Alaska.

This Writ brings up for review the sole question, *Is soliciting, by an Indian, of the sale to him, of liquor, a crime under the provisions of Sec. 142 of the Alaska Criminal Code as amended in 1909?*

At the outset, this must seem to this Honorable Court an innovation,—a novel and unique construction upon Sec. 142; yet, that is the claim by the Government; and the consequent judgment of conviction and sentence, upon that theory, has compelled the bringing of this Writ of Error.

As the Complaint is manifestly founded upon Sec. 142, it becomes essential to have it before us, in order to test the question sought to be reviewed.

Sec. 142 of the Alaska Criminal Code as amended in 1909 reads as follows:

"That if any person shall, without the authority of the United States, or some authorized officer thereof, sell, barter, or give to any Indian or half-breed who lives and associates with Indians, any spirituous, malt, or vinous liquor or intoxicating extracts, such person shall be fined not less than one hundred nor more than five hundred dollars or be imprisoned in the penitentiary for a term not to exceed two years."

Clearly, a Complaint, or Conviction, under the wording of this section must be predicated upon the actual commission of the offense of SELLING LIQUOR TO AN INDIAN; but that is not what the Complaint charges, however; the offence charged, in the Complaint, is, SOLICITING AND INCITING ANOTHER TO COMMIT the offence prohibited by Sec. 142. *Yet*, that is not all; the Complaint accuses the defendant (below) of having *solicited another to sell HIM (the defendant) liquor.* There is no charge in the Complaint, that the defendant was soliciting the purchase of liquor in order to peddle or sell it to other Indians; but the flat charge is that he *solicited and incited the complaining witness to sell him some whiskey;* it stops there; it does not charge that he *succeeded* in procuring the whiskey; in other words, the offence *of selling liquor to an Indian* was only SOLICITED AND INCITED; he is not charged with having *procured* the whiskey.

It must at once be plain and clear to this Honorable Court that the *plaintiff in error is not charged, in the Complaint, with the crime set forth in Sec. 142;* but with the offence of SOLICITING AND INCITING ANOTHER to commit that crime; but it should be noted, however, that he solicited the purchase for *himself;* in other words, *the liquor was for himself, the defendant* (below); the Complaint charges that the *solicitation* was

"to sell, barter and give spirituous liquor, to-wit: *whiskey, to the said Dan Lott*, the said Dan Lott being then and there an Indian. * * *"

There is no charge in the Complaint, nor from any interpretation of the wording thereof, that the liquor which the plaintiff in error solicited was intended to be sold by him to other Indians; in other words, he is not charged with being a so-called *booze-peddler.* We must simply take the plain intent and meaning of the Complaint, which is, that he SOLICITED THE COMPLAINING WITNESS TO SELL HIM SOME WHISKEY. It is this last act of defendant's which must be contemplated by the provisions of Sec. 142, and held to be a crime; *if not, then the conviction cannot stand.*

Let us suppose that the plaintiff in error had been *successful in procuring the liquor* from the

complaining witness, Ford,—the crime defined in Sec. 142 would then have been fully committed. What crime? Certainly, the crime of *selling liquor to* (plaintiff in error) *an Indian*. But who, then, would have committed the crime? Certainly not the Indian,—he would not be guilty of any crime contemplated by Sec. 142 in RECEIVING or BUYING the liquor;—the crime would then have been committed *by no other than the complaining witness*, Ford.

It is respectfully submitted that the act of *buying* liquor by an Indian is not what is aimed at by Sec. 142; the act prohibited by Sec. 142 is the act of *selling it*. The decision must depend upon the answer to the question, *Is the buyer of intoxicating liquor* (who is in the class to whom the sale of liquor is prohibited) *equally guilty with the seller?*

The general weight of authority is strongly in the *negative*. Particularly should this be so in the present case, *as the defendant is within the class of persons* to whom the sale of liquor is prohibited. The plaintiff in error is, in the Complaint, designated as an Indian; Sec. 142 prohibits the sale of liquor to Indians. Now, the Complaint charges that the Indian solicited the purchase of liquor. The sale was not consummated. Just where did the Indian com-

mit an offence under Sec. 142? *He did not sell it, and he did not buy it.* It must be too clear for argument that the plaintiff in error is not charged in the Complaint with the offence mentioned in Sec. 142.

II.

Sec. 218 Does Not Create Common Law Crimes Against United States.

It will be claimed by the Government that Sec. 218 of the Alaska Criminal Code, by which the common law of England is adopted in Alaska, CREATES the crime charged in the Complaint, and that plaintiff in error, under that section, is guilty of the offence charged.

Sec. 218 of the Alaska Criminal Code reads as follows:

"(Common law of England adopted.) The common law of England as adopted and understood in the United States shall be in force in said district except as modified by this Act. (30 Stat. L. 1285.)"

Sec. 218 DOES NOT CREATE COMMON LAW CRIMES of which the UNITED STATES could take cognizance; the only crimes of which the United States can take cognizance are those which are *specifically defined by Congress.* A common law offence cannot by any process of reasoning be made

an offence against the United States, unless Congress has by specific enactment declared the same an offence.

United States vs. Eaton, 144 U. S. 677.

Peters vs. United States, 94 Fed. Rep. p. 127.

Wilkins vs. United States, 96 Fed. Rep. p. 837.

In the case of *In Re: Greene*, 52 Fed. Rep. p. 104 at p. 111, it was said:

"In the consideration of this indictment it should be borne in mind that THERE ARE NO COMMON LAW OFFENCES AGAINST THE UNITED STATES; that the Federal Courts cannot resort to the common law as a source of criminal jurisdiction; and that Congress must define these crimes, fix their punishment, and confer the jurisdiction to try them."

In Re: Greene, 52 Fed. Rep. p. 104, at p. 111.

Assuming for the purpose of argument, however, that Sec. 218 creates common law crimes, *that* section cannot create a crime, *which was not a crime at common law*. THE COMMON LAW DID NOT DEAL WITH INDIANS, and the first legislation concerning Indians was enacted by Congress:

By Sec. 1955 Rev. Stat. (being the act of May 17th, 1884), the President was authorized to prohibit, restrict and regulate, the importation of fire-

arms, ammunition and distilled spirits in the Territory of Alaska.

By the act of May 17th, 1884, by Sec. 14, the importation, manufacture and sale of intoxicating liquors in the Territory of Alaska (with certain exceptions) was prohibited, and the President was required to make regulations to carry the same into effect.

By Sec. 142 of the act of March 3rd, 1909, the act of selling liquor or fire-arms to Indians was prohibited; and Sec. 1955 and certain parts of Sec. 14 were repealed.

The amendment of 1909 makes two changes in Sec. 142 of the act of 1899; first, it changes the character of the offence by making it a felony; second, it prohibits the sale of liquor to Indians who have not become citizens of the United States.

So that the amendment of 1909 makes it a felony for any person to sell liquor to an Indian who has not become a citizen of the United States.

Therefore it is respectfully submitted that Sec. 218 of the Alaska Criminal Code, does not create the crime specified in Sec. 142, which prohibits the sale of liquor to Indians. Consequently, it follows as a

matter of course, that the act of *soliciting and inciting* another to commit the crime prohibited by Sec. 142 is not a crime under Sec. 218.

III.

Soliciting Another to Commit a Crime "Malum Prohibitum" No Offence.

Assuming that plaintiff in error had actually succeeded in procuring the liquor,—that is, that had he been successful in soliciting and inciting the full commission of the crime under Sec. 142,—would he then be *particeps criminis?*

The weight of authority is *against the proposition,* although he knows that the circumstances will render the sale of the liquor an offence.

The Government will claim that solicitation of another to commit a crime should be punished; and that the solicitation by an Indian, of a white man, to commit the crime of furnishing liquor to the Indian, should be punished,—because the act prohibited by Sec. 142 is a felony. This proposition would be sound if all felonies were *mala in se;* but manifestly this is not the case. The act of selling liquor to an Indian is in itself lawful, at most it is indifferent; it is only made an offence by Sec. 142,

and Sec. 142 makes the commision of the offence therein prohibited a felony. So this is one case where a felony is not *malum in se*.

THE SOLICITATION OF ANOTHER TO COMMIT A CRIME DOES NOT DEPEND UPON A MERE TECHNICAL DEFINITION OF A FELONY; the TRUE TEST is whether the crime, to commit which another has been solicited, is within the classes designated *mala in se* or *mala prohibita*. SOLICITING another to commit a crime which is *malum prohibitum*, SHOULD NOT BE PUNISHED; the act of inciting another to commit the crime of selling liquor to an Indian in violation of Sec. 142 is *malum prohibitum*, and is, therefore, not a crime under the leading cases.

In the Massachusetts case of *Com. vs. Willard*, 22 Pick. 476, which seems to be a leading case on the subject, the distinction was made that in cases where the offence was of those designated *mala prohibita* THE BUYER WAS NOT GUILTY OF ANY OFFENCE; but in cases where the offence was of those designated *mala in se* the buyer was guilty of the offence of aiding and abetting in the commission of the offence under the statute. *Mr. Chief Justice Shaw*, speaking for the Court in that case, used the following language:

"We know of no case where an act which, previously to the statute, was lawful or indifferent, is prohibited under a small, specific penalty, and while the soliciting or inducing another to do an act by which he may incur the penalty, is held to be itself punishable. Such a case perhaps may arise, under peculiar circumstances, in which the principle of the law, which in itself is a highly salutary one, will apply; *but the Courts are all of opinion that it does not apply to the case of one who, by purchasing spirituous liquor of an unlicensed person, does, as far as that act extends, induce that other to sell in violation of the statute.*"

In the case just quoted from, it was laid down that THE PRIME CONSIDERATION in determining whether a person is guilty of an offence, in soliciting another to commit a crime,—must be the determination of the question, WHETHER THE CRIME ITSELF IS OF A HIGH AND AGGRAVATED CHARACTER. Quoting further from the opinion by *Mr. Chief Justice Shaw*—

"It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon a mere legal and technical distinction between felony and misdemeanor. *One consideration, however, is manifest in all the cases,* and that is that the offence proposed to be committed, by the counsel, advice or enticement of another, *is of a high and aggravated character,* tending to breaches of the peace or other great disorder and violence, being

what are usually considered 'MALA IN SE,' or criminal in themselves, in contra-distinction to 'MALA PROHIBITA,' or acts otherwise indifferent then, as they are restrained by positive law." (Id.)

In the case of *State vs. Cullins,* 24 L. R. A. 212 (Kan.), the *Willard case* is approved and quoted from; and makes the same holding. In the *Cullins case* the Court also made the distinction which was made in the *Willard case;* that where the offence is *malum prohibitum* the person who solicits the commission of the offence is not guilty with the principal; but where the offence is *malum in se* the person soliciting the offence is equally guilty with the person who actually commits the crime. In that case the Court said:

"Notwithstanding the amendment to the constitution prohibiting the sale and manufacture of intoxicating liquors, *the offence of selling intoxicating liquors* in violation of the constitution and the statute, *is an offence mala prohibita* and is not of the class which are considered *mala in se.*"

State vs. Cullins, 24 L. R. A., p. 212, at p. 214; see Note.

"*The purchaser of liquor* which is sold in violation of law, although he knows the sale to be illegal, *cannot be held guilty of any offence, on the ground of his soliciting* or tempting the seller to violate the law, or on the ground of his having aided and abetted the crime to the mere extent of buying the liquor."

23 *Cyc.* p. 210 (h); and cases there cited.

IV.

"Attempt" No Crime Under Sec. 142.

In the case of the *United States vs. Stephens (Circuit Court, D. Oregon),* 12 Fed. Rep. p. 52, the defendant was accused of the crime of introducing spirituous liquors into the District of Alaska contrary to law; and by the second count of the information, of the crime of *attempting* to so introduce such liquors into said District. The defendant demurred to the information on the ground that the facts stated in the information did not constitute a crime.

The information was brought under Sec. 1 of the Alaska Act of June 27th, 1868 (Sec. 1954, Rev. Stat.), as amended by the general Appropriation Act of March 3rd, 1873, which provides among other things, that "if any person shall introduce or attempt to introduce any spirituous liquors or wine into the Indian Country" (with certain exceptions), he "shall forfeit and pay a sum not exceeding $300.00."

It will be noticed from the quoted excerpt of this section, that an *attempt* to commit the offence

prohibited by this act is also made a crime. Congress undoubtedly recognized the necessity for including an *attempt* under this section, as an attempt to commit that crime is specifically included in the act defining the crime.

"It is doubtless if any attempt to commit an offence of this character is indictable at common law, and this is probably the reason why it was made so specifically by the act defining the crime."

United States vs. Stephens, 12 Fed. Rep. 52.

Yet under this section, which by its terms includes an *attempt*, it was held in that case that—

"an offer to purchase whiskey with the intent to ship it to Alaska, is in any view of the matter, a mere act of preparation, of which the law takes no cognizance." (Id.)

The decision goes a little further and holds that even the purchase of liquor, with intent to take it into Alaska, or to give it to a minor, does not constitute an *attempt* under the section above quoted.

"A purchase of spirituous liquor at San Francisco or Portland either in person or by written order or application, with intent to commit a crime with the same,—as to dispose of it at retail without a license, or to a minor, or to introduce it into Alaska,—is merely a preparatory act indifferent in its character, of which the law * * * cannot take cognizance." (Id.)

See also

Westheimer vs. Weisman, 57 Pac. (Kan.) 969.

Anderson vs. South Chicago Brewing Company, 50 N. E. (Ill.) 655.

V.

PURPOSE OF SEC. 142 IS TO PROTECT THE INDIAN.

There is still another reason why SOLICITATION OF THE PURCHASE, by an Indian, of intoxicating liquor, in violation of Sec. 142, should not be held an offence under Sec. 218.

The very evident intent of Congress in enacting the provisions of Sec. 142, and similar enactments, was to *protect* the Indian. The Alaska Indian, was, by the treaty with Russia, guaranteed the same rights and privileges as the Indian of the United States. This was expressly held in the case of *Nagle vs. United States,* 191 Fed. Rep. 141, wherein *Judge Wolverton,* speaking for the Court in that case said:

"There can be no doubt that this stipulation relates to the Indian tribes of Alaska, and manifestly the treaty was designed to insure them like treatment, under the laws and regulations of Congress, as should be accorded Indian tribes in the United States."

So that *to punish an Indian for soliciting* the sale of liquor to him, *would,* under the plain meaning and intent of the *Nable case, be a violation of the treaty* of the United States with Russia, by which the United States assumed the *guardianship* over the Alaska Indian.

The proposition of punishing an Indian for an attempt to procure liquor is wholly unsound, and out of harmony with the reasons which impelled Congress by specific legislation, to make it an offence, for any person to furnish liquor to an Indian.

The legislation by Congress was made in the spirit of acknowledgement that the United States assumed *responsibility and guardianship* over the Indian, and so enacted legislation, under which persons, who furnished the Indian with liquor, could be punished. It surely was not the intent of Congress to punish the Indian for *asking* for liquor; in fact, the legislation was for the purpose of *protecting* the Indian from the white man—and so—to punish any person who supplied him with what Congress intended he should not have. It is not maintained that an Indian selling liquor to another Indian would not be amenable to punishment under the provisions of Sec. 142; but it is claimed that it was not the intent of Congress to punish an Indian

under Sec. 142 for *asking* for liquor or for *soliciting and inciting* another to furnish it to him; but on the contrary, that it was the intent of Congress in enacting Sec. 142, *to place the responsibility upon the person who furnished* him with liquor, in violation of law, and to provide a penalty for such violation.

VI.

Indian Is Ward of Government, and as Such He Should Be Treated.

The Government holds that the Indian should be punished for asking for liquor, *in order to protect the white man* from committing the crime prohibited by Sec. 142.

This theory is absolutely ill-founded, and is inconsistent with the evident intent of Congress in enacting Sec. 142 punishing *other persons* for furnishing liquor to the Indian. If it was the intention of Congress to punish the Indian for *soliciting* that which that section forbids *other persons* to furnish him, Congress would have so provided by special enactment.

The Indian is the *ward* of the Government and as such he should be treated. THE CRIME CONSISTS IN SELLING HIM LIQUOR; *not in his soliciting its purchase.* Does the law punish *minors,*

to whom the sale of liquor is prohibited, for *receiving* it, or for *asking* for it? Does a parent punish the child for *asking* for what it is forbidden to have?

From a reading of Sec. 142 and the reasons which prompted Congress to enact that section, it must be clear that the legislation prohibiting the sale of liquor to Indians was made *against the white man*, and for the *benefit of the Indian*. If the conviction in this case is upheld, the effect thereof will be that the Indian for whose benefit the law was made would be punished; and THE WHITE MAN, AGAINST WHOM THE LAW WAS MADE, WOULD GO FREE.

VII.

If Buyer Were to Be Held Guilty With Purchaser, Sec. 142 of the Alaska Criminal Code Would Become Nugatory.

If the buyer, to whom the sale of intoxicating liquor is prohibited, could be held equally guilty with the purchaser, the effect thereof would be to render Sec. 142 of the Alaska Criminal Code absolutely nugatory; as *prosecutions* under that act, as well as similar acts, are most always *sustained* against the seller, *by the testimony of the buyer;* and in a prosecution against the seller, AN INDIAN

WHO HAD PURCHASED LIQUOR COULD HOLD HIMSELF EXEMPT FROM TESTIFYING CONCERNING THE SALE, ON THE GROUND THAT SUCH TESTIMONY MIGHT INCRIMINATE HIM. The result of which would be that no conviction could be obtained against white men, *booze peddlers*, in the Indian country, nor in Alaska, as the *Indian-buyer*, in each case, could be instructed to claim exemption from testifying as a witness against the seller.

THIS WOULD RENDER SEC. 142 OF THE ALASKA CRIMINAL CODE ABSOLUTELY USELESS, *and the sale of liquor to Indians in Alaska*, as well as in the Indian territory, *could be conducted with dire results to the Government, and with great profit to such class of persons as would follow this occupation, with the assurance of absolute immunity from prosecution under Sec. 142.*

"If this Court should determine that, in prosecutions against parties for the unlawful sale of intoxicating liquors, the purchaser is equally guilty with the seller, *the statute would be much more difficult of enforcement.* Most of the convictions, in prosecutions of this kind, are sustained by the testimony of purchasers; and, *if purchasers and sellers are equally guilty, prosecutions will be less successful than heretofore.* * * *"

State vs. Cullins (Kan.), 24 L. R. A., p. 212, at p. 214.

SUMMARY OF POINTS.

The *points* upon which the argument herein is founded are given below, upon any one, or all of which, the conviction in this case should be reversed, and the fine ordered remitted.

1.

Inciting and soliciting the PURCHASE of liquor is not a crime under Sec. 142 of the Alaska Criminal Code.

2.

Soliciting a *sale* might be an offence under Sec. 142; BUT SOLICITING A "PURCHASE" could not by any elastic reasoning be brought within the crime defined in Sec. 142.

3.

The BUYER—to whom the sale of liquor is prohibited—*is not guilty* of a crime in BUYING the liquor.

4.

If the BUYER is equally guilty with the *seller*, STILL HE IS NOT GUILTY OF A CRIME IN

"ATTEMPTING" TO BUY THE LIQUOR.

5.

That if an INDIAN-PURCHASER is held equally guilty with the WHITE-MAN-SELLER, under Sec. 142, no convictions could be had against the *white-man-seller* for violating the provisions of that section, BECAUSE THE INDIAN-PURCHASER COULD NOT BE COMPELLED TO TESTIFY AGAINST THE "SELLER," ON THE GROUND THAT HIS TESTIMONY MIGHT INCRIMINATE HIM.

6.

A violation of Sec. 142 is a felony; a felony is a common law crime; by Sec. 218 of the Alaska Criminal Code, the common law is revived; BUT, SOLICITATION OF ANOTHER TO COMMIT A CRIME WHICH IS "MALUM PROHIBITUM" IS NOT A CRIME.

7.

Sec. 218 of the Alaska Criminal Code *does not* CREATE common law crimes; THERE ARE NO COMMON LAW CRIMES AGAINST THE UNITED STATES, EXCEPT THOSE WHICH HAVE BEEN SPECIFICALLY DEFINED BY ACT OF CONGRESS.

8.

If it is held that Sec. 218 of the Alaska Criminal Code CREATES common law crimes, STILL THE DISTINCTION MUST BE MADE BETWEEN SOLICITING A CRIME WHICH IS "MALUM IN SE" AND ONE WHICH IS "MALUM PROHIBITUM."

9.

Selling liquor to an Indian WAS NO CRIME AT COMMON LAW; therefore Sec. 218 of the Alaska Criminal Code could not make SOLICITING that offence a crime.

10.

Sec. 142 is designed to PROTECT the Indian; and is directed AGAINST the white man. In its practical application, its effect is to PROTECT the BUYER and to EXPOSE the SELLER.

LASTLY.

Convictions under Sec. 142 will be impossible, if INDIAN-BUYERS or INDIANS SOLICITING THE PURCHASE of liquor can be held guilty of an offence under that section. AND THE EFFECT WILL BE THAT SEC. 142 WILL BECOME NUGATORY.

IN CONCLUSION, it desired to call the attention of this Honorable Court to the fact that the purpose of the Government in Alaska in attempting to obtain convictions of Indians who *ask for* liquor —or even—(to go a step further)—of those Indians who *solicit its purchase, by a bribe*—is not readily discernible; perhaps there is present in Alaska a condition of affairs that might make it necessary to punish the Indian for attempting to bribe white men into selling them liquor; or, it may be that in most cases the violation of Sec. 142 by white men is directly chargeable to the act of the Indian in offering a bribe to the white man;—but it is submitted, with respectful sincerity and force, that Acts of Congress which *create* and *define* crimes, *as clearly as Sec. 142 defines the crime therein set forth* MUST NOT, by an elastic process of reasoning, be drawn forward to meet and to embrace an act or practice—(that, it may be, has become offensive, or even dangerous, to the people of a certain place or locality)—in order to remedy that condition or to stop or punish that practice. If there is a condition present in Alaska which requires that Indians should be punished for offering bribes to white men to sell them liquor, it should be remedied by the recommendation of the necessary enactment by Congress.

Exhaustive effort has been made to find a similar case, but without success. It is thought to be entirely true to say that *this is the first time* that any such construction has ever been put upon Sec. 142 of the Alaska Criminal Code, as that put upon it by the Government in *securing the conviction* of the plaintiff in error in the District Court of Alaska.

By reason of all of which it is respectfully submitted that the act of SOLICITING another to commit the crime defined in Sec. 142 of the Alaska Criminal Code, IS NOT A CRIME UNDER THAT SECTION; NOR UNDER SEC. 218 OF THE ALASKA CRIMINAL CODE; NOR UNDER ANY LAW.

The demurrer interposed by the plaintiff in error *should have been sustained*, and in overruling the same, there was error, for which the judgment of conviction and sentence should in all things be set aside and reversed, and the fine remitted.

All of which is respectfully submitted.

KAZIS KRAUCZUNAS,
Attorney for Plaintiff in Error.

WM. J. CLAASSEN,
Of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 2201.

DAN LOTT,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE GOVERNMENT'S POSITION.

The plaintiff in error, Dan Lott, an Indian, was complained against in the Commissioner's Court for Ketchikan Precinct, District of Alaska, First Division, and charged with soliciting one C. Ford to commit the felony of furnishing liquor to an Indian, to-wit, Dan Lott himself.

The complaint is based upon the following propositions:

(1) That in enacting laws which are intended to be of local application in Alaska only, and not of federal or nation-wide application, Congress acts in the capacity of a local legislature—acts *qua* state legislature, and that in that capacity Congress has plenary powers, subject only to the general constitutional guaranties and limitations; and that acting in that capacity Congress enacted Section 218 of the Penal Code of Alaska which reads as follows:

> "COMMON LAW OF ENGLAND ADOPTED. The common law of England as adopted and understood in the United States shall be in force in said District, except as modified by this Act."

(2) That Dan Lott solicited the commission of a felony and said Section 218 makes it a misdemeanor to solicit the commission of a felony; the felony so solicited by Dan Lott to be committed being a violation of Section 142 of the Penal Code of Alaska as amended by the Act of February 6, 1909, ch. 80, 35 Stat. L. 601, 603, the said section as amended reading as follows, to-wit:

> "Sec. 142. That if any person shall, without the authority of the United States, or some authorized officer thereof, sell, barter, or give to any Indian or half-breed who lives and associates with Indians, any spirituous, malt, or vinous liquor or intoxicating extracts, such person shall be fined not less than one hundred nor

more than five hundred dollars or be imprisoned in the penitentiary for a term not to exceed two years.

"That the term 'Indian' in this Act shall be construed to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States."

(3) That the fact that Dan Lott is an Indian does not exempt him from the operation of Section 218.

ORDER OF THE ARGUMENT.

In sustaining these propositions and answering the objections to them made in the brief of the plaintiff in error, our argument will take the following order and form:

I. Congress, acting *qua* state legislature, had full power and authority to enact said Section 218, and the enactment thereof extended to Alaska "the common law of England as adopted and understood in the United States," except as modified by the Penal Code.

II. Section 218 (A) effects more than an extension of the common law rules of interpretation and construction to Alaska, and (B) makes the common law of crimes, except as modified by the Code, applicable and in force in Alaska without the necessity of there being an express statutory designation or definition of such common law crimes: it does exactly

what it purports to do—extends the common law of crimes to Alaska, except as modified by the Code.

III. Such extension makes the solicitation by one person of the commission of a felony by another person a misdemeanor.

IV. Indians soliciting other persons to commit a felony are guilty of the misdemeanor of solicitation, for Indians are not exempted from the operation of Section 218 either (A) because they are Indians, or (B) because they are wards of the Government, or (C) because it would be impolitic to hold them subject to its operation, or (D) because there was no common law crime of furnishing liquor to Indians.

ARGUMENT.

I.

CONGRESS, ACTING *QUA* STATE LEGISLATURE, HAD FULL POWER AND AUTHORITY TO ENACT SAID SECTION 218, AND THE ENACTMENT THEREOF EXTENDED TO ALASKA "THE COMMON LAW OF ENGLAND AS ADOPTED AND UNDERSTOOD IN THE UNITED STATES," EXCEPT AS MODIFIED BY THE PENAL CODE.

The brief of plaintiff in error declares, in effect, that Section 218 must be void, of no effect, and meaningless, because, to quote the language of that brief, "the only crimes of which the United States can take cognizance are those which are specifically defined by

Congress. A common law offence cannot by any process of reasoning be made an offence against the United States, unless Congress has by specific enactment declared the same an offence." (Brief of Plaintiff in Error, pp. 10-11.) The argument and the authorities cited therein are wholly beside the point.

While there are no common law offenses against the United States, *qua* national government, it does not follow that the Congress, in enacting laws, *qua* state legislature, for a Territory, may not make a general provision extending to such Territory "the common law of England as adopted and understood in the United States" (meaning, obviously, as adopted and understood in general by the several States of the United States). In legislating for a Territory as such (and not as an integral part of the federal whole), Congress acts as a state legislature acts when enacting laws for a State. This is a wholly different field of action from that which is embraced in ordinary federal legislation.

American Insurance Co. v. Canter, 1 Pet. 511, 546.

National Bank v. County of Yankton, 101 U. S. 129.

Binns v. United States, 194 U. S. 486.

Gibbons v. District of Columbia, 116 U. S. 404.

Mattingly v. District of Columbia, 97 U. S. 687.

In re Dana, 68 Fed. Rep. 886, 899.

Allen v. Myers, 1 Alaska 114, 118.

In the leading case of American Insurance Co. v. Canter, *supra,* Chief Justice Marshall said (p. 546):

"Although admiralty jurisdiction can be exercised in the States, in those courts only which are established in pursuance of the third article of the constitution; the same limitation does not extend to the territories. *In legislating for them, congress exercises the combined powers of the general, and of a state government.*" (All italics in this brief are ours.)

In National Bank v. County of Yankton, *supra*, Mr. Chief Justice Waite said, speaking for the Court (pp. 132-133):

"It is certainly now too late to doubt the power of Congress to govern the Territories. . . . Congress may legislate for them *as a State does for its municipal organizations.* . . In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories *what the people, under the Constitution of the United States may do for the States.*"

In Binns v. United States, *supra*, the Court said (p. 491):

"It [Congress] may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them

a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code."

The Supreme Court, in deciding Gibbons v. District of Columbia, *supra*, said in reference to Loughborough v. Blake, 5 Wheat. 317:

> "The point there decided was that an act of Congress, laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution, might comprehend the District of Columbia; and the power of Congress, *legislating as a local legislature for the District*, to levy taxes for District purposes only, *in like manner as the legislature of a State* may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318; Welch v. Cook, 97 U. S. 541; Mattingly v. District of Columbia, 97 U. S. 687. In the exercise of this power, Congress, *like any State legislature* unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In Mattingly v. District of Columbia it was said by the Court (p. 690):

> "Congress may legislate within the District [of Columbia], respecting the people and property therein, *as may the legislature of any State* over any of its subordinate municipalities."

As was said by the Court In re Dana, *supra,* (p. 899):

> "In administering the local law of the District of Columbia, the national government there acts *as the State governments act* within their several limits in administering the ordinary rights of person and property. That is an exceptional and a wholly different field of action from what is embraced in ordinary federal legislation."

Congress, not only in all national matters, but also in all local and municipal matters relating to a Territory, has plenary powers, within constitutional limitations.

Shively v. Bowlby, 152 U. S. 1, 48.
Binns v. United States, 194 U. S. 486, 491.
Mormon Church v. United States, 136 U. S. 1, 42.
McAllister v. United States, 141 U. S. 174, 184, 188, 190.
Endelman v. United States, 86 Fed. Rep. 456, 459.

In Shively v. Bowlby, *supra*, the Court said (p. 48):

> "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government

> which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition."

In Binns v. United States, *supra*, the Supreme Court, speaking by Mr. Justice Brewer, said (p. 491):

> "It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution . . ."

Speaking by Mr. Justice Bradley, the Supreme Court said in Mormon Church v. United States, *supra* (p. 42):

> "The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire Territory, and no power to govern it when acquired."

From these authorities it follows that Congress, in enacting the Code for Alaska, was perfectly competent to extend the common law of crimes to Alaska. And acting *qua* State legislature it has done so by

Section 218, if it be possible so to extend the common law by a provision of a general nature; and that it is possible there can be no question. Otherwise, it would be necessary to enact the common law by specific statute—with the result that the law would then be statutory, not common law. That an extension to a Territory of the common law can be made by a general provision has been held repeatedly.

8 Cyc. 386 (C.) and cases cited in Note 22.
In re Burkell, 2 Alaska 108, 119.
Valentine v. Roberts, 1 Alaska 536.
Browning v. Browning, 9 Pac. (N. M.) 677, 684.

And see as recognizing the extension of the common law by such general enactment

Luhrs v. Hancock, 181 U. S. 567.

Cyc., *supra,* reads:

> "As a general rule by express adoption, the common law is the rule of decision in the courts of the Territories of the United States, except in so far as it is inapplicable or inconsistent with acts of Congress or of the territorial legislature."

The District Court of Alaska expressly held, in deciding In re Burkell, *supra,* that Section 218 extended the common law of crimes to Alaska.

In Browing v. Browning, 9 Pac. 677 (N. M.), in discussing the effect of an enactment by the territorial legislature reading "in all courts of this Territory, the common law, as recognized in the United States of America, shall be the rule of practice and

decision," the Court, adverting to the meaning of the term "common law" as used in that enactment, said (p. 684):

> "In those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the constitution or laws of the United States, nor of the State or Territory, and which were suitable to the wants and condition of the people, are the common law of such States and Territories.
>
> "This Territory belongs to the last class. It was not a part of the original colonies, but was acquired in 1848. The legislature has not in terms adopted any British statutes, nor has it undertaken to define what is embraced in the words 'common law' used in Section 1823, *supra*. We are therefore of opinion that the legislature intended, by the language used in that section, to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this Territory, which are applicable to our condition and circumstances, and which were in

force at the time of our separation from the mother country."

And the Court accordingly held that by the enactment of the above quoted general provision extending the common law, the statute of limitations (21 Jac. I) was extended to and became operative in the Territory of New Mexico.

II.

SECTION 218 EXTENDS THE COMMON LAW OF CRIMES—IT DOES NOT (A) MERELY SUPPLY A RULE OF INTERPRETATION OR CONSTRUCTION, OR (B) STAND IN NEED OF SUPPLEMENTATION BY EXPRESS DESIGNATION OR DEFINITION OF COMMON LAW CRIMES.

From the foregoing considerations it is apparent that Congress had the power to extend to Alaska the common law of crimes, and Section 218 purports to effect such extension, except as modified by the Code. Two objections have been made to such an interpretation: (A) that Section 218 merely extends the common law rules of interpretation and construction; (B) "that Sec. 218, Alaska Criminal Code, Part I, does not create common law crimes; that the common law of England does not apply to Alaska in so far as to create common law crimes not expressly designated by law." (First Assignment of Error, p. 5 of Brief of Plaintiff in Error.)

(A) In the argument on the demurrer in this case the counsel for defendant stated that Section

218 merely extends the common law as an aid in construing the statutory law. There are traces of the same idea in the brief of plaintiff in error. In ruling on the demurrer Judge Lyons made the following statement with reference to this argument:

> "The defendant contends that Section 218 merely extends the common law to Alaska as an aid in construing the statutory law; that the only purpose of Section 218 is to extend the common law rule of interpretation to the District of Alaska.
>
> "If the defendant's contention be tenable it would seem that Section 218 is superfluous, for in the construction of statutory law or in the ascertainment of the meaning of any of the terms employed the Court would look to the common law as the same has been construed by the courts without the common law actually being extended by specific legislation. The rules of interpretation which would be followed by the Court in any event would be the rules adopted and adhered to by the English and the American courts. The original growth and meaning of the law and its terms must be ascertained where any doubt exists, by considering the original history and growth of the provisions of the statute as well as the language used by the legislature. In order, therefore, to give full force and effect to Section 218 it must be construed to extend the common law of England as adopted and understood in the United States, except where the

same is modified by statutory enactment, to the District of Alaska." (The whole opinion of the lower court in overruling the demurrer is given herein: see Appendix A.)

We think this disposes of the first objection.

(B) The meaning of the first assignment of error is obscured by the word "create." Laws never create crimes but only declare that certain acts are crimes; the persons who commit the forbidden acts create the crimes. The word "create" must therefore be here used in some other sense. Putting the only reasonable construction we can think of on the first assignment it is understood to mean that unless an act is made criminal by some section of the Code expressly declaring such act to be criminal, Section 218 does not make it so. That is, to use the language of the assignment of error, an act which was a crime at the common law is not a crime in Alaska unless "expressly designated by law" to be a crime. Which is but another way of saying that Section 218 is without any effect whatsoever. For "expressly designated" must mean defined and declared to be a crime, and then the act so declared to be a crime would be such without the aid of Section 218. In other words this process of reasoning is but a method of declaring that Congress did not mean anything at all by Section 218, notwithstanding it is a sweeping general provision appended to the end of the Title defining crimes and at the end of the chapter in that Title which embodies general provisions respecting crimes in Alaska. Such a construction is manifestly absurd,

and absurd constructions are to be avoided if possible. Moreover such a construction violates the canon that all parts of a statute shall be given meaning and effect and made to stand together, if possible.

The authorities cited in the brief of plaintiff in error to the effect that there are no common law crimes against the United States as a national government, state that in order to constitute an act which was criminal at common law, a crime against the federal government, it must be "expressly designated," defined, and the punishment prescribed; otherwise the federal courts cannot entertain jurisdiction or take cognizance of it. But those authorities are totally beside the point; as we have demonstrated they have no application whatsoever to a statute enacted by Congress, acting in the capacity of a local legislature for a Territory, by which the common law is extended to that Territory.

The foregoing considerations, we submit, dispose of the first assignment of error.

III.

THE EXTENSION BY SECTION 218 OF THE COMMON LAW OF CRIMES MAKES THE SOLICITATION BY ONE PERSON OF THE COMMISSION OF A FELONY BY ANOTHER PERSON A MISDEMEANOR.

The common law rule appears clearly from the authorities to be that he who solicits another to commit

either a felony or a misdemeanor is guilty of the misdemeanor of solicitation.

1 Bishop's New Cr. L., §768.
1 McClain's Cr. L., §220.
Rex v. Vaughn, 4 Burr. 2494.
Rex v. Plympton, 2 Lord Raym. 1377.
Rex v. Higgins, 2 East 5.
State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.
United States v. Lyles, 4 Cranch C. C. 469, Fed. Cas. No. 15,646.
Com. v. Harrington, 3 Pick. 26.
Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569.

Bishop says (1 New Cr. Law, §768):

". . . to render a solicitation indictable, it is in general, as in other attempts, *immaterial whether the thing proposed is technically a felony or a misdemeanor* . . ."

And again the same author says (1 New Cr. L., §768 c. 2):

"The adjudged law, from early times down to the present day, makes mere solicitation, in the circumstances explained in the foregoing sections, an indictable attempt. And a sufficient form of the averment is settled to be that, at a time and place mentioned, the defendant 'falsely, wickedly, and unlawfully did solicit and incite' a person named to commit the substantive crime, without any further specification of overt acts. The adequacy of this form of the allegation stands unquestioned and unquestionable in the

authorities, ancient and modern; and, beyond cavil or possible overthrow, it proves that solicitation is an adequate attempt; *and that the doctrine is general, not limited to special offenses.*"

McClain says (1 Cr. Law, §220):

"The form of intent which perhaps involves the least degree of criminality is that of a solicitation of another to do an act which, if done, would constitute a *crime,* and such a solicitation is generally held to be punishable as a misdemeanor, although the offense solicited is never committed."

Grose, J., in Rex v. Higgins, said:

"All these cases prove that inciting another to commit a misdemeanor is itself a misdemeanor; *a fortiori,* therefore, it must be such to incite another to commit felony."

There was no statute against the offense charged against Harrington in the case of Com. v. Harrington, 3 Pick. 26, namely, renting his house to a woman known to him to be a prostitute. The Court said that the question was whether it was indictable at common law, and concluded that defendant could be convicted

"because he let the house for that purpose; it being at common law a misdemeanor to incite, aid or encourage one to commit *a misdemeanor.*"

Speaking through Judge Redfield the Court said in the case of State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450:

> "And we feel no hesitation in saying, that . . . soliciting another to commit *an offense* should . . . be held indictable, as misdemeanors at common law."

In Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, the Court said:

> ". . . we are of opinion that it is a misdemeanor to propose to receive a bribe. It must be regarded as an inciting to offer one, and a solicitation to commit an offense. This, at common law, is a misdemeanor. Inciting another to the commission of an *indictable offense,* though without success, is a misdemeanor."

But it is not necessary for the defendant in error to establish that one who solicits another to commit a *misdemeanor* is guilty of a crime. The plaintiff in error was charged with soliciting the commission of a felony, and conceding that some of the courts have wavered concerning the criminality of soliciting the commission of a misdemeanor, there is no division among them as to the criminality of soliciting the commission of a felony: they are unanimous in holding that at common law he who incites another to do a felonious act is guilty of a misdemeanor. This is the view which Judge Lyons supported in his opinion given in ruling on the demurrer in this case, which opinion is given in full in Appendix A herein, and the following authorities are to the effect that soliciting the commission of a felony is a misdemeanor:

1 Hawkins P. C. 55.

1 Russ. on Cr. 49.

3 Chitty's Cr. Law 994

1 Bishop's New Cr. L. §768.

1 McClain's Cr. L. §220.

Rex v. Higgins, 2 East 5 (Larceny).

Rex v. Plympton, 2 Lord Raym. 1377 (Bribery) (10 Geo. II).

Rex v. Vaughn, 4 Burr. 2494 (Bribery) (1769).

Rex v. Philipps, 6 East. 464.

Rex v. Johnson, 2 Show. 1 (30 Chas. II).

Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569 (Bribery).

State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450 (Obstructing justice).

State v. Bowers, 35 S. C. 262, 15 L. R. A. 199 (Arson).

Com. v. Randolph, 146 Pa. St. 83, 23 Atl. 388, 28 Am. St. Rep. 782 (Murder).

Stabler v. Com., 95 Pa. St. 318, 40 Am. Rep. 653 (Murder).

State v. Avery, 7 Conn. 266, 18 Am. Dec. 105 (Adultery).

Com. v. Flagg, 135 Mass. 545 (Arson).

State v. Sales, 2 Nev. 268 (Embracery).

People v. Bush, 4 Hill (N. Y.) 134 (Arson).

State v. Holding, 1 McCord L. 31 (Obstructing justice).

State v. Davis, Tapp. (Ohio 1817) 171.

Pennsylvania v. McGill, Addison 21 (1792).

State v. Sullivan (Mo.), 84 S. W. 105 (Bribery).

People v. Hammond (Mich.), 93 N. W. 1084 (Bribery).

In Rex v. Higgins, A solicited B (a servant of C) to steal goods from C. B did not do so. A was held guilty of the misdemeanor of soliciting the commission of a felony. Lord Kenyon said:

> "But it is agreed that a mere intent to commit evil is not indictable without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act . . ."

Le Blanc, J., in the same case, said:

> "It is contended that the offense charged in the second count, of which the defendant has been convicted, is no misdemeanor, because it amounts only to a care, wish, or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done, namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done, and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to."

And Grose, J., in the same case, said:

> "But further, an attempt to commit even a misdemeanor has been shown in many cases to be itself a misdemeanor. Then, if so, it would be extraordinary indeed if an attempt to incite to a felony were not also a misdemeanor. If a rob-

bery were actually committed, the inciter would be a felon. The incitement, however, is the offense, though differing in its consequences, according as the offense solicited (if it be felony) is committed or not. The guilt of an accessory before is in many cases as great as that of the principal; sometimes indeed it is even deserving of greater punishment. For the principal is often put upon committing the offense by the accessory before, and is instructed by him how to perpetrate it . . ."

"It is also objected, that some act should be laid to have been done in pursuance of the incitement; but I do not remember any case where such an averment has been holden to be necessary; nor can it be deemed so, if, as I conceive, the gist of the offense is the incitement: and indeed if the incitement were to commit felony, and the fact were committed, the inciter would himself be a felon."

Lawrence, J., said:

"All such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is whether an attempt to incite another to steal is not prejudicial to the community, of which there can be no doubt."

In Rex v. Plympton the facts were that in a certain town corporation twelve burgesses and twelve assistant burgesses were to elect one of their number as mayor. A and B were two of the twenty-four

burgesses and assistants. A promised B 500 pounds sterling if he would vote for C for mayor, and A was found guilty of the misdemeanor of solicitation.

In Rex v. Vaughn the facts were as follows: The Duke of Grafton was the First Lord of the Treasury and Privy Councillor. A desired to obtain for the lives of his three sons the position of Clerk of the Court of Jamaica. To accomplish this he sought the aid of B, who had influence with the Duke, and induced B to promise the Duke 5000 pounds sterling if the said position were given to A for said three lives. A was held guilty of the crime of solicitation.

In Rex v. Johnson the defendant Johnson was an attorney and in the trial of a civil action he became convinced that a certain deed introduced in evidence by the adversary was a forged instrument; acting in good faith he offered to a man who, he supposed, could establish the fact that the instrument was a forgery, the sum of 350 pounds sterling for proof that it was a forgery; Johnson was convicted of the crime of soliciting with money the giving of evidence. Shortly afterwards he died from the suffering which the disgrace brought upon him, and many years afterwards the deed was actually established by judicial inquiry to be a forgery.

A general provision of the statutes of Nevada extended the common law of crimes to Nevada, the same as Section 218 extends it to Alaska. And in State v. Sales, 2 Nev. 268, the Court said (p. 271):

> "Under this view of the law, if the defendant solicited the attorney to employ money to corruptly influence the jury, he is indictable for inciting or soliciting another to commit the crime of embracery."

Smith v. Com., 54 Pa. St. 209, was a case of solicitation to adultery and it was held that such solicitation was not a crime, but it was admitted that where the offense solicited to be committed is a felony, the solicitation is a crime. And in a later case in the same court, Com. v. Randolph, 146 Pa. St. 83, 28 Am. St. Rep. 782, it is said:

> "Smith v. Commonwealth, 54 Pa. St. 209, 93 Am. Dec. 686, decided that solicitation to commit fornication and adultery is not indictable. But fornication and adultery are mere misdemeanors of our law, whereas murder is a capital felony."

And in the Randolph case it was held that solicitation to commit a felony is a crime.

In People v. Hammond, 93 N. W. (Mich.) 1084, 1085, the Court says:

> "It is strenuously contended that the indictment charges no offense known to the laws of this state. It is conceded by the learned counsel for the state that there is no statute defining the offense set out in the indictment, but it is contended that the case falls within the statute (Comp. Laws, §11,795) providing for the punishment of offenses indictable at the common

law. In other words, it is claimed that the indictment sets out an offense at the common law. Respondent's counsel assert that solicitation to commit a crime is not indictable when there is interposed between a solicitation on the one hand and the proposed illegal act on the other the resisting will of another person, which other person refuses assent and co-operation; citing, among other cases, McDade v. People, 29 Mich. 50, and Smith v. Comonmwealth, 54 Pa. St. 209, 93 Am. Dec. 686. It may be accurate to say that what is treated in the law as an attempt to commit a crime is not complete where there is interposed between the solicitor and the consummation of the completed offense the resisting will of the one whom the solicitor seeks to employ as the active agent. But to say that a solicitation may not amount to an offense under these circumstances is to deny that a solicitation to commit a felony is punishable at the common law as a substantive and completed offense. Can this be properly asserted?"

What is said in State v. Sullivan, 84 S. W. 105, 108, is distinctly applicable to the case at bar:

". . . while there is no statute on the subject, yet to solicit a bribe is a misdemeanor under the common law in force in this state. While it was a felony at common law to bribe a judicial officer, it does not appear clear whether it was a felony or a misdemeanor to bribe other offi-

cers. The distinction becomes important from the fact that it is not altogether certain that soliciting one to commit a misdemeanor is a common-law offense. The books leave such question in a state of uncertainty. It has been said that to bribe a legislative officer is only a misdemeanor at common law, and that to solicit the commission of a misdemeanor is not an offense; that soliciting the bribe in this case was merely soliciting the commission of a misdemeanor, and was therefore not a common-law offense. While, as we have just said, doubt has been cast on the question, yet we believe that it was a common-law offense to incite or solicit another to commit a misdemeanor. . . . Text-writers have laid down the law that to solicit the commission of an offense was indictable, without noticing any distinction whether the offense solicited was a felony or misdemeanor. Bishop on Crim. Law, *supra;* Wharton on Crim. Law, *supra;* 1 Russell on Crim. Law, 193, 194. These writers look only to the character of the offense in its evil tendency, and not to its technical designation."

And again the Court says, in the same case (p. 109):

"But if we should be mistaken in the view that to solicit one to commit a misdemeanor is itself a misdemeanor at common law, it would not affect this case. For it is certain that to solicit the commission of an offense which is a felony

is a misdemeanor at common law. It can make no difference whether the offense which is solicited is made a felony by act of parliament or by the common law. It is only necessary that it be a felony, no matter how made so. In those jurisdictions where it prevails, the common law is a standing declaration that whoever solicits the commission of a felony is guilty of a misdemeanor. It is not a declaration that whoever solicits the commission of an offense which is a felony at any given time shall be guilty of a misdemeanor, but it is a declaration that whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor. In this state the statute makes it a felony to bribe a legislative officer. If the defendant solicited that he be bribed, he solicited the commission of a felony, and he therefore committed a common-law misdemeanor."

Thus it is clear that the solicitation to commit a *statutory* felony is a common law misdemeanor.

State v. Sullivan, 84 S. W. (Mo.) 105, 109.
People v. Hammond, 93 N. W. (Mich.) 1084, 1085.

These cases dispose of the contention that because furnishing liquor to Indians was not a crime at common law therefore the solicitation of the crime of furnishing liquor to Indians cannot be a crime. The learned editor who wrote the note on solicitation to

crime in 25 L. R. A. 434, said of the rule contended for by plaintiff in error that it

> "does not allow for the growth of the common law which is certainly a thing of growth. In fact, indictments for solicitation to crime are of comparatively modern origin, and in some cases have not been used until quite recently."

Though we conceive it is not so much that the common law "grows" as that it is applicable to new subject matters and situations as the progress of time and society bring about new conditions.

Again, to the argument that furnishing liquor to Indians was not a crime at common law and therefore solicitation to furnish liquor to Indians cannot be a crime, it can be answered that the same argument, if valid, would prevent the application to railroads of the common law rules relating to common carriers, because there were no railroads in the old common law days. Instances might be multiplied indefinitely. Solicitation to crime was a crime at common law. The old rule is applicable to new circumstances whenever they arise. Therein, as has been said so frequently, lies the chief virtue of the common law. Solicitation to crime being at the common law a crime, it matters not that the crime solicited to be committed is defined by the last penal statute placed on the statute book—even if the ink is not yet dry—a solicitation to commit a breach of that statute is the common law offense of solicitation. It is but new wine in old bottles—a new subject matter

falling within an old rule. As was said in State v. Sullivan, *supra*:

> ". . . whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor."

Solicitation to commit an indictable offense, though without success, is a misdemeanor.

State v. Bowers (S. C.), 15 L. R. A. 199.
People v. Hammond (Mich.), 93 N. W. 1084.
Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, 571.
Com. v. Randolph, 146 Pa. St. 83, 28 Am. St. Rep. 782.
Com. v. Flagg, 135 Mass. 545.

In Sulston v. Norton, 3 Burr. 1235, decided in 1761, Lord Mansfield said of a case where a bribe had been offered and accepted but the promise not carried out:

> "And I wonder how it could ever be a doubt: For the offense was completely committed by the corrupter; whether the other party shall afterwards perform his promise or break it."

The failure of the animate agent whom the defendant attempted to employ, to commit the solicited crime does not excuse the defendant—he is nevertheless guilty of the crime of solicitation. As was said by the Court in State v. Bowers (p. 201):

> "There can be no doubt that a person may commit a felony either by his own hand or by

the hand of another, prompted or encouraged by him; and, if he undertakes to commit a felony by his own hand, and his purpose is frustrated by the failure of the inanimate agencies which he employs to serve his felonious purpose, he would unquestionably be guilty of an attempt to commit a felony. Upon the same principle, if, instead of undertaking with his own hand to effect his felonious purpose, he undertakes to employ the agency of another, furnishing him with the means requisite to effect his purpose, and offering him an inducement to do so, the fact that such agent fails him will not relieve him from responsibility for that which he not only intended to have done, but which he took the necessary steps to accomplish. If the failure of the inanimate agency to effect the purpose which he desired and intended to accomplish will not relieve him from responsibility for the felonious act which he attempted to perpetrate by the use of such agency, we do not see why the failure of his animate agent to carry out the purpose which he desired him to effect, and furnished him with the means of effecting, should relieve him from like responsibility."

And in Walsh v. People, *supra,* it is said:

"Inciting another to the commission of an indictable offense, *though without success,* is a misdemeanor."

In the head note in Com. v. Flagg, 135 Mass. 545, it is said:

> "It is an indictable offense at common law for one to counsel and solicit another to commit a felony, although the solicitation is of no effect, and the crime counseled is not in fact committed."

Mr. Irving Browne says in his note to Stabler v. Com., 40 Am. Rep. 653, 657:

> "As we said at the outset, the true doctrine probably is, that any *direct mere solicitation to commit a specific criminal offense* against a particular individual, or the community, *although not consummated,* is indictable as a solicitation, but not as an attempt."

The brief of plaintiff in error has attempted to draw a distinction between the law of solicitation as it applies to soliciting an unlawful sale of liquor and as it applies to soliciting the commission of other crimes. It is claimed that though soliciting the commission of other crimes is criminal, yet soliciting a felonious sale of liquor is no crime at all. Two cases are chiefly relied on to buttress this position.

The case which is principally relied upon by the plaintiff in error as supporting his contention that the case at bar does not present an instance of criminal solicitation is Commonwealth v. Willard, 22 Pickering 474, in which the Court held that solicitation by A of B (who had no license to sell liquor), to sell liquor to A was not a crime. In Massachusetts selling liquor without a license was a misdemeanor, not a felony. In Alaska furnishing liquor

to Indians is a felony. And the case against Willard is rather an authority for the position taken by the Government in this case than otherwise. The Court stated:

> "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. *In general, it has been considered as applying to cases of felony,* though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed, by the counsel, advice or enticement of another is of a high and aggravated character, *tending to breaches of the peace or other great disorder or violence.* being what are usually considered *mala in se* or criminal in themselves, in contradistinction to *mala prohibita,* or acts otherwise indifferent than as they are restrained by positive law . . ."

The furnishing of liquor to Indians not only tends to breaches of the peace and disorder and violence but in most cases actually brings about such breaches and disorders; the whole experience of the white people with the Indians, both in Alaska and throughout continental United States, has been that the use of liquor by Indians is highly injurious not only to themselves but to the white people among whom they live and with whom they associate; in other words,

that the furnishing of liquor to Indians is an evil in itself.

The Court further says in the Willard case:

> "We know of no case, where an act which, *previously to the statute, was lawful or indifferent,* is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be itself punishable."

The furnishing of liquor to Indians has never, in all of the experience of the white people with the aborigines of America, been indifferent in its results. It is common knowledge that it has universally been most calamitous in its consequences. And it has never, since the United States acquired Alaska, indeed, never since 1824, been lawful to furnish the Indians there with liquor; of this we shall speak more at length hereafter.

Hence, on the true view of the facts, it is immaterial whether the criterion by which the solicitation is determined to be criminal or non-criminal be (a) that the solicited offense is a felony or (b) that it is a *malum in se;* for in either view of the matter the solicitation in this case was a crime. But the Court, in the Willard case, has admitted that the authorities hold that soliciting the commission of a felony is a crime. Of the law of solicitation the Court says:

> *"In general, it has been considered as applying to cases of felony."*

The Supreme Judicial Court of Massachusetts has

at no time adopted or followed the rule which plaintiff in error claims to extract from the Willard case —has never held that soliciting the commission of crime is criminal only when the crime solicited to be committed is *malum in se*. Indeed in Com. v. Harrington, 3 Pick. 26, a case decided before the Willard case, that court held explicitly that the defendant Harrington was guilty, though the crime which he solicited and incited *was only a misdemeanor*, the Court saying,

> "it being at common law a misdemeanor to incite, aid, or encourage one to commit a misdemeanor."

Shaw, C. J., in Com. v. Willard approved of the decision in Com. v. Harrington, and said:

> "The keeping of such a disorderly house has long been considered a high and aggravated offense, criminal in itself, tending to general disorder, breaches of the public peace, and of common nuisance to the community."

As we have already seen, in Com. v. Flagg, 135 Mass. 545, Norton, C. J., said (the case was decided in 1883):

> "It is an indictable offense at common law for one to counsel and solicit another to commit a *felony* or other aggravated offense, although the solicitation is of no effect, and the crime counselled is not in fact committed."

And, continuing, the Court said:

> "The first and second counts of the indictment in the case at bar allege with sufficient certainty that the defendant solicited one Thomas Stafford to burn the barn of one Ellen H. Clark *and set out an offense at common law.*"

Thus the highest court of Massachusetts has consistently recognized and enforced the rule for which we contend, namely, that he who solicits the commission of a felony is guilty of a misdemeanor.

The other case relied on by plaintiff in error is State v. Cullins (Kans.), 24 L. R. A. 212. That case holds that the purchaser of liquor from one not authorized to sell it is not guilty of aiding and abetting in the unlawful sale. In the first sentence of the opinion the Court thus stated the legal proposition involved in the case:

> "The question in this case is whether the purchaser of liquor which is sold in violation of law is guilty of *unlawfully selling the same;* that is, whether, by purchasing, he counsels, *aids, or abets* in the unlawful sale, and may be convicted in the same manner *as if he were the principal.*"

And the Court answered the question in the negative. There was no question of solicitation in the case and could not be without express statute because *there is no common law of crimes in Kansas.* The Supreme Court of Kansas said in State v. Bowles, 79 Pac. 726, 731:

> "There are no common-law offenses in this State, and there can be no convictions in this

State except for such crimes as are defined by statute."

Hence the Cullins case is in no respect whatever an authority against the position of the defendant in error in the present case.

IV.

INDIANS ARE NOT EXEMPTED FROM THE OPERATION OF SECTION 218 EITHER (A) BECAUSE THEY ARE INDIANS, OR (B) BECAUSE THEY ARE WARDS OF THE GOVERNMENT, OR (C) BECAUSE IT WOULD BE IMPOLITIC TO HOLD THEM SUBJECT TO ITS OPERATION, OR (D) BECAUSE THERE WAS NO COMMON LAW CRIME OF FURNISHING LIQUOR TO INDIANS.

The argument against holding an Indian responsible for soliciting another person to commit a felony has assumed various forms: (A) that the Indian cannot be punished for a violation of law because he is an Indian; (B) that he ought not to be punished for such violation because he is a ward of the government and should be indulged and pampered and exempted from the operation of penal statutes, and (C) that he ought not to be punished because to punish him for soliciting another person to give him liquor would be impolitic since so doing would make it impossible to convict those who furnish the liquor to him; (D) that the law of solicitation does not cover a solicitation to furnish liquor to an Indian

because there was no common law crime of furnishing liquor to Indians.

We have answered this last objection, and in the course of our examination of the legal status of Indians in Alaska we will answer the others.

A.

INDIANS IN ALASKA ARE PUNISHABLE UNDER THE SAME LAWS, BY THE SAME PROCEDURE, AND IN THE SAME COURTS, AS ALL OTHER INHABITANTS OF THAT TERRITORY.

The Indians of Alaska have not at any time been considered as having a title to the land of the Territory in such a sense as to make Alaska "Indian country" within the meaning of Section 1 of the Indian Intercourse Act of June 30, 1834, 4 Stat. L. 729, as that section is explained by the Supreme Court of the United States in the case of Bates v. Clark, 95 U. S. 204, 208, or within the amplification of that explanation by the same court in the case of Ex parte Crow Dog, 109 U. S. 556, 561.

The first section of the act of 1834 is as follows:

> "Be it enacted, that all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State[,] to which the Indian title has not been extinguished, for the purposes

of this act, be taken and deemed Indian country."

The Supreme Court said in the case of Bates v. Clark, *supra* (pp. 208-209):

> "The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case . . .
>
> "It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress."

And in Ex parte Crow Dog the Court said (p. 561):

> "In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been

> acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it."

Alaska is not Indian country within this definition because the treaty of cession from Russia clearly negatives the idea that the Indian tribes or nations had any right of possession or otherwise to the soil of Alaska. The rights of individual Indians to their possession of the land occupied by them was guaranteed by the treaty, but it is apparent that the *tribes* were deemed to have no such rights.

The treaty provides:

> "His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, *all the territory and dominion* now possessed by his said Majesty on the continent of America and in the adjacent islands . . ." Art. I.
>
> "In the cession of territory and dominion

made by the preceding article are included the right of property in all public lots and squares, *vacant lands*, and all public buildings, fortifications, barracks, and other edifices which are not private individual property." Art. II.

"The *cession of territory and dominion* herein made *is hereby declared to be free and unincumbered* by any *reservations, privileges, franchises, grants, or possessions*, by any associated companies, whether corporate or incorporate, Russian or any other, *or by any parties, except merely private individual property holders;* and the cession hereby made conveys all the rights, franchises, and privileges *now belonging to Russia in the said territory or dominion,* and appurtenances thereto." Art. VI.

Thus Russia guaranteed that neither the Indians nor any one else had any rights in the lands of the Territory except as "private individual property holders" and the United States took the Territory free from all rights of possession or occupancy by the Indians as nations or tribes and subject only to their rights or holdings as "private individual property holders." Therefore Alaska has never been a part of the "Indian country." As was said by Judge Deady in Kie v. United States, 27 Fed. Rep. 351, 354:

"At the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore; and the right of the inhabitants in and to the use of the soil was such, and only such, as it saw proper to acknowledge or concede

to them. The United States took the country on the same footing, agreeing to respect the private property of individuals, and to make such regulations concerning the uncivilized natives, including, of course, their occupation of the soil, as it might deem best."

Hence the provisions of Sections 2145 and 2146 of the Revised Statutes have never applied to the Indians in Alaska. Those sections are as folows:

"Sec. 2145. Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"Sec. 2146. The preceding section shall not be construed to extend to (crimes committed by one Indian against the person or property of another Indian, nor to) any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

If these sections applied to Alaska they would clearly, in many cases, give the tribal organizations, instead of the courts, jurisdiction of offenses committed by Indians.

But as Alaska is not a part of the Indian country

it has been expressly held that those sections of the Revised Statutes do not apply to the Indians of Alaska and that therefore Alaskan Indians are subject to the same penal laws, and are to be tried by the same courts and by the same procedure as white men or any other persons who are accused of crime.

United States v. Kie, Fed. Cas. No. 15,528a.
Kie v. United States, 27 Fed. Rep. 351.

In the Kie case, *supra,* the defendant, an Alaskan Indian living at Juneau, stabbed and killed his Indian wife because she had committed adultery. His counsel contended that Sections 2145 and 2146 of the Revised Statutes, quoted above, applied, that therefore the Indian tribe, not the court, had jurisdiction of the defendant and his crime. Both Judge McAllister in the trial court and Judge Deady in the appellate court held that, Alaska not being Indian country, those sections did not apply and that the District Court of Alaska had jurisdiction. Judge Deady said (27 Fed. Rep. 354):

> "Congress, by the passage of the Alaska act of 1884, has provided a government for the country without any reservation or qualification as to the persons or classes of inhabitants over and upon whom it shall have jurisdiction and authority."

Indians are indicted and tried at every term of the District Court of Alaska, First Division. No question is ever raised about the legality of these prosecutions.

Alaska not being Indian country the statutes enacted at sundry times applying to the Indian country and the Indians therein, were deemed not to apply to Alaska and the Indians therein.

We have thus established that the general laws relating to the Indian country have no application in Alaska. But it is sometimes said that Alaska is to be considered Indian country for the purpose of excluding liquor from the hands of the natives there. It may be useful, in this connection, to ascertain the exact meaning of that statement by tracing the history of the Indian liquor law, as it applies to Alaska; and also to ascertain whether in any sense whatever the Indian is saved or excepted from responsibility for his acts violative of that law.

History of Alaska Liquor Law.

The first "liquor law" in Alaska was that provided by the treaty with Russia dated April 17, 1824, and found in 8 Stat. L. 304. By the fourth article of that treaty it was agreed that for a period of ten years next ensuing the ships of both powers might trade with the natives of the northwest coast of America (both the Russian and United States coasts).

By the fifth article it was provided:

> "All spirituous liquors, fire-arms, other arms, powder and munitions of war of every kind, are always excepted from this same commerce permitted by the preceding article, and the two powers engage, reciprocally, neither to sell, nor suf-

fer them to be sold to the natives by their respective citizens and subjects, nor by any person who may be under their authority. It is likewise stipulated that this restriction shall never afford a pretext, nor be advanced, in any case, to authorize either search or detention of the vessels, seizure of the merchandise, or, in fine, any measures of constraint whatever towards the merchants or the crews who may carry on this commerce; the high contracting powers reciprocally reserving to themselves to determine upon the penalties to be incurred, and to inflict the punishment in case of the contravention of this article, by their respective citizens or subjects."

To enforce the terms and spirit of this fifth article the Act of May 19, 1828, ch. 57, 4 Stat. L. 276, was passed, which provided:

"Be it enacted" etc. "That if anyone, being a citizen of the United States, or trading under their authority, shall, in contravention of the stipulations entered into by the United States with the Emperor of all the Russias, by the fifth article of the treaty, signed at St. Petersburg, on the seventeenth day of April, in the year of our Lord one thousand eight hundred and twenty-four, sell, or cause to be sold, to the natives of the country on the northwest coast of America, or any of the islands adjacent thereto, any spirituous liquors, fire-arms, or other arms, powder or munitions of war of any kind, the person so offending shall be fined in a sum not

less than fifty nor more than two hundred dollars, or imprisoned not less than thirty days, nor more than six months."

Alaska was acquired by the United States in 1867. A general and somewhat loose statute applying to intercourse with Alaska was enacted on July 27, 1868 (ch. 273, 15 Stat. L. 241) which later became Sections 1954 and 1955, R. S., the material provisions of which are as follows:

"Sec. 1954. The laws of the United States relating to customs, commerce, and navigation are extended to and over all the main-land, islands, and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto.

"Sec. 1955. The President shall have power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska,"—

the remainder of Section 1955 providing the penalty for a violation of any order or regulation the President might make in the premises.

It was held in United States v. Seveloff, 2 Sawy. 311, Fed. Cas. No. 16,256, that these provisions of the Act of July 27, 1868, did not extend the Indian Intercourse Act of 1834 to Alaska. In order that the

Indians of Alaska might be placed on the same footing as the Indians in the Indian country as regards the introduction of liquor, Congress by express enactment, Act of March 3, 1873, 17 Stat. L. 530, extended Sections 20 and 21 of the Intercourse Act of 1834 to Alaska. Those sections relate to the introduction of liquor into the Indian country, and became Sections 2139, 2140 and 2141 of the Revised Statutes.

Hence the only parts of the Indian Intercourse Law which have ever been operative in Alaska are Sections 20 and 21 thereof. It therefore is sometimes stated that as to the introduction of spirituous liquor into Alaska that Territory is "Indian country."

United States v. Seveloff, Fed. Cas. No. 16,252.
Water v. Campbell, Fed. Cas. No. 17,264.
In re Carr, Fed. Cas. No. 2,432.
United States v. Stevens, 12 Fed. Rep. 52.
14 Opinions Attorneys General 327.

But in no other respect is it so—and in this respect only by figure of speech, because, as we have seen, it does not answer the definition of Section 1 of the Act of 1834 or the explanation or amplification thereof by the Supreme Court of the United States. As Attorney General Devens said (16 Opinions Attorneys General 142):

> "In the opinion of my predecessor, Attorney-General Williams, of November 13, 1873, in answer to the inquiry whether the Territory of Alaska was embraced within the term 'Indian country,' he holds that as to these provisions

> Alaska is to be regarded as Indian country; but it will be observed that he limits his opinion to these two sections, and does not hold that in the general use of the term Alaska is to be treated as Indian country, and be subjected to all the laws which have been made in relation to such country . . .
>
> "Alaska cannot be considered merely as an Indian country. It is inhabited to a limited extent by white persons, whose rights, property, and religion, which were guaranteed by the treaty between the United States and Russia, should be protected by the United States, and the whole Territory cannot be subjected to the rules applied to Indian country, unless, at least, Congress should expressly render it subject to them."

Of course Congress could have enacted, after its acquisition of Alaska, that the Territory should be considered as Indian country and subject to all the provisions of the Indian Intercourse Act of 1834 and the amendments and supplements thereto. But Congress has seen fit not to do so; it has seen fit to extend only said Sections 20 and 21.

In United States v. Seveloff, *supra*, Judge Deady says:

> "The district attorney maintained that Alaska is a part of the Indian country, because it is inhabited by Indians, and because the act defining the Indian country, and regulating trade and intercourse with the Indians, and all other

acts not locally inapplicable, were extended over the country *proprio vigore,* as soon as it was acquired from Russia."

And the court answered that argument by saying:

"'The Indian country,' within the meaning of the statute, making it a crime to introduce spirituous liquors therein, is only that portion of the United States or its territories, which has been declared to be such by an act of Congress. Because a country is inhabited or owned in whole or in part by Indians, it is not therefore an Indian country, within the purview of the trade and intercourse acts."

In short Alaska never became Indian country by force of the definition thereof in the Intercourse Act of 1834, or by force of the interpretation of that definition by the Supreme Court, or by force of any act of Congress enacted for that purpose, except only that Sections 20 and 21 of the law of 1834 were extended to Alaska by the act of 1873.

Thus the law stood until the enactment of the statute of May 17, 1884, ch. 53, 23 Stat. L. 24, organizing the territorial government. This organic act provided, among other things (Sec. 14):

"That the provisions of chapter three, title twenty-three, of the Revised Statutes of the United States, relating to the unorganized Territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture, and sale of in-

toxicating liquors in said district except for medicinal, mechanical and scientific purposes is hereby prohibited under the penalties which are provided in section nineteen hundred and fifty-five of the Revised Statutes for the wrongful importation of distilled spirits. And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section."

Sections 1954 and 1955, above quoted, are the first two sections of said chapter three, title twenty-three, Rev. St. We need not refer further to Section 1954 since it has been held not to be *in pari materia* with the other sections mentioned.

United States v. Seveloff, Fed. Cas. No. 16,252.

The law of 1884, in absolutely prohibiting the importation, manufacture and sale of intoxicating liquors in Alaska, except for medicinal, etc., purposes, took from the President the power to exercise any discretion in the matter which the law of 1868 gave to him. Thus from 1873 till the adoption of the Penal Code in 1899, Sections 20 and 21 of the Indian Intercourse Act of 1834 and also the law of 1868 were in force in Alaska, modified after 1884 by the provision regarding introducing liquors for medicinal, etc., purposes.

On March 3, 1899, the Penal Code was enacted; Section 142 thereof was as follows:

"That if any person shall, without the authority of the United States, or some authorized

officer thereof, sell, barter, or give to any Indian or halfbreed who lives and associates with Indians any firearms or ammunition therefor whatever, or any spirituous, malt, or vinous liquor, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than two months nor more than six months, or by fine not less than one nor more than five hundred dollars. That the term 'Indian' in this Act shall be so construed as to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood. Section nineteen hundred and fifty-five of the Revised Statutes of the United States, and all that part of section fourteen of 'An Act providing a civil government for Alaska,' approved May seventeenth, eighteen hundred and eighty-four, after the word 'provided,' is hereby repealed."

This section of the Code has uniformly been considered and treated as superseding said Sections 2139, 2140 and 2141 (which are the old Sections 20 and 21 of the Indian Intercourse Act of 1834); it is so considered because, covering the same general subject-matter, it effects a repeal by implication. It expressly repeals Section 1955 (which is that part of the law of 1868 which empowered the President to restrict, regulate or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within Alaska,—and which had already been repealed by implication by the Act of 1884).

Then by Act of February 6, 1909, Section 142 was amended by striking out the reference to fire-arms and ammunition, by making the furnishing of liquor to Indians a felony, instead of a misdemeanor, and by excepting Indians who have become citizens from the purview of the section.

Hence so far as the legal liability of an Indian who furnishes liquor to another Indian in Alaska is concerned, there has not at any time been one iota of difference between him and a white man who committed the same offense. Then why should there be any difference when, instead of furnishing another Indian with liquor, he solicits some other person to do so? Alaska has not at any time been Indian country in such a sense that an Indian offender was to be tried there by the Indian tribunals. The natives there have at all times been amenable for their crimes to the white man's courts exclusively. Such is the law and such has been the universal practice in Alaska.

"Liquor," "Fire-Arms" and "Ammunition" Are Associated Words.

We have seen that the treaty of 1824 with Russia prohibited the introduction into Alaska of "all spirituous liquors, fire-arms, other arms, powder, and munitions of war of every kind"; that the Act of 1828 passed to make the prohibition effectual used exactly the same language; that the Act of 1868 gave the President "power to restrict and regulate or to prohibit the use of fire-arms, ammunition and dis-

tilled spirits into and within the Territory of Alaska"; and that Section 142 of the Code as originally enacted in 1899 had the same general terms in it. It was not until 1909 that the reference to fire-arms and ammunition was omitted. Hence from 1824 to 1909 it had been the policy of Russia and the United States to keep the natives of Alaska from having fire-arms and munitions of war as well as from having liquor.

Was this provision regarding fire-arms and ammunition "for the protection of the Indian against the white man," to use the phrase of plaintiff in error's brief? Was Congress afraid that the white man would shoot the Indians? Or was it to keep the Indians from acquiring the means of killing one another and the white people? Clearly, it was the latter. If that be true then why should it be argued that the exclusion of distilled spirits is on a different footing? In the Statutes the three are associate terms—"fire-arms, ammunition and distilled spirits." It is reasonable to conclude that they were all linked to carry out the same general policy. It was a fact well learned by Congress and the country at large that not only are fire-arms and ammunition in the hands of Indians dangerous to the whites, but that whiskey and Indians are a combination still more dangerous to the whites with whom the Indians associate. The same policy, therefore, undoubtedly prompted the exclusion of distilled spirits as that which inspired the exclusion of fire-arms and ammunition—the policy of protecting, first, the whites against the In-

dians and, secondly, the Indians against their own worse nature—the policy of protecting the whole mixed society of whites and Indians.

B.

MEANING OF THE STATEMENT THAT INDIANS ARE WARDS OF THE GOVERNMENT — THE REAL POLICY OF THE GOVERNMENT STATED.

It has frequently been said that the Indians are wards of the government, and appropriately. But by that it was meant that the government should not take any unfair advantage of them, should faithfully perform its treaty and other understandings with them, should duly guard and protect them, and should in all things act in as conscientious a manner towards them as a guardian should toward his ward. It was not intended by that expression to declare that for their crimes Indians should receive no punishment; to say they are wards of the government is not to declare that Indians have *carte blanche* to commit any and all crimes, or any crime at all, with impunity. If they are in a state of pupilage, if we are responsible for their good behavior, one of the best ways to secure their welfare and virtue is to punish them for their crimes. And this has been the policy adopted by the government.

It may be useful in this connection to trace the liability of Indians to punishment for their crimes, with particular reference to their liability to such punishment for violations of the law against furnishing liquor to other Indians in the Indian country.

History of Federal Indian Liquor Law—Liability of Indians Thereunder.

The Indian Intercourse Act of March 30, 1802, ch. 13, Sec. 21, 2 Stat. L. 139, was as follows:

> "Sec. 21. And be it further enacted, That the President of the United States be authorized to take such measures from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding."

Then by Act of March 3, 1817, ch. 92, 3 Stat. L. 383, Congress clearly expressed the intention to subject Indians to punishment for any crime they might commit, and provided that unless treaties forbade or the crimes were against Indians (and, therefore, punishable by the Indian tribes themselves) the offender should be punished like other criminals. The act provided:

> "Be it enacted" etc. "That if any *Indian*, or other person or persons, shall, within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offense, or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other

punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place or district or country under the sole and exclusive jurisdiction of the United States.

"Sec. 2. And be it further enacted, That the superior court in each of the territorial districts, and the circuit court and other courts of the United States, of similar jurisdiction in criminal causes . . . shall have, and are hereby invested with, full power and authority to hear, try, and punish, all crimes, offenses, and misdemeanors, against this act; . . . Provided, That nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary."

The act of July 9, 1832, ch. 174, 4 Stat. L. 564, makes no discrimination in favor of Indians who give liquor to other Indians. Section 4 reads as follows:

"And be it further enacted, That no ardent spirits shall be hereafter introduced, under any pretense, into the Indian country."

The Act of June 30, 1834, ch. 161, 4 Stat. L. 729, covers Indian offenders as well as white offenders. It provides:

"Sec. 20. And be it further enacted, That if *any person* shall sell, exchange, or give, barter, or dispose of, any spirituous liquors or wine to an Indian (in the Indian country), such person shall forfeit and pay the sum of five hundred dollars; and if *any person* shall introduce, or attempt to introduce, any spirituous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person *or Indian* is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any spirituous liquor or wine is found, the goods, boats, packages, and peltries of such person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other

half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section."

The expression "any person" includes Indians.

United States v. Miller, 105 Fed. Rep. 944.
United States v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.
United States v. Tom, 1 Ore. 27.

The Act of March 3, 1847, ch. 66, 9 Stat. L. 203, amended section twenty of the Act of 1834 by making it a felony to furnish liquor to Indians in the Indian country or to introduce liquor into said country.

Hence throughout this legislation it is clear that Congress intended that Indians who furnished liquor to other Indians should be subject to punishment.

Such was the policy of the government until March 27, 1854, when Congress enacted (ch. 26, Sec. 3, 10 Stat. L. 270) that nothing contained in section twenty of the Act of 1834 "which provides for the punishment of offenses therein specified, shall be construed to extend to any Indian committing said offenses in the Indian country." But in the revision and reenactment of said section twenty of the law of 1834 in the Acts of 1862, 12 Stat. L. 339, and 1864, 13 Stat. L. 29, Indians were again made punishable for fur-

nishing liquor to other Indians. That status of the law continued to the adoption of the Revised Statutes in which the revisers inserted in Section 2139, the words "except an Indian, in the Indian country," thus again making dispunishable the Indian dispenser of liquor to his fellow-Indian. But the words so inserted by the reviser apparently were not noticed by Congress at the time of the adoption of the Revised Statutes for by Act of February 27, 1877, ch. 69, 19 Stat. L. 244, the words "except an Indian, in the Indian country" were stricken from Section 2139 and ever since then the Indian, like the white man, has been punishable if he furnished liquor to Indians. Hence during all the time from 1802 to this day, except a total of about ten years, the Indian who furnished liquor to another Indian in the Indian country has been punishable for so doing. And he has repeatedly been held so to be punishable.

United States v. Miller, *supra.*
United States v. Shaw-Mux, *supra.*
United States v. Tom, *supra.*

C.

THE ARGUMENT FROM IMPOLICY AND INCONVENIENCE IS SPECIOUS AND PROVES TOO MUCH.

In probably fifty per cent of the cases of furnishing liquor to Indians the seller makes the first advances, and holding Indians liable for soliciting infractions of the law against furnishing them with liquor would not affect such cases at all. But very,

very often, as is well known to all Alaskans, the Indian openly solicits a non-Indian to furnish him liquor. Sometimes the request is refused. Should not that Indian be punished for solicitation? In many cases the request is granted, but usually—indeed, in a large majority of the cases—the man himself who grants the request is drunk at the time. The Indian, with the cunning and shrewdness characteristic of the race, sees that the white man is maudlin drunk and takes advantage of the opportunity to persuade the latter to procure him liquor. Should not such an Indian be punished? Should all the punishment fall on the white man and should the Indian be wholly exempted from punishment for soliciting the commission of the crime? Should the white man be branded as a felon and punished by imprisonment in the penitentiary for a term of two years, and the Indian escape entirely the comparatively light punishment for the misdemeanor of soliciting?

The argument of impolicy derived from the inconvenience that may attend obtaining convictions against those who furnish liquor to Indians, is specious. It is argued that if the Indian who solicits and incites should be liable to conviction it will be impossible to convict the white man who furnishes him with liquor because the Indian can claim exemption from testifying, as to testify would criminate himself. Now in the first place, no prosecutor ever thinks of trying to convict on the testimony of the Indian alone who obtained the liquor, unless there

were several Indians in the party. In the second place, the same argument would apply in multitudes of other cases in which, nevertheless, criminal liability exists; for example, when a bribe is given by one and received by another the testimony of either against the other may be used, but this fact does not furnish a valid argument why either the one or the other should be legally dispunishable; so in cases of conspiracy, and many other offenses—in fact in all cases where two or more persons are engaged in the commission of crime, either as principals or accessories.

RECAPITULATION.

We submit, therefore, that the following propositions are incontrovertible:

(1) At the common law it was a misdemeanor to incite and solicit the commission of any felony.

(2) It made no difference whether the crime solicited to be committed was a felony at the common law or by statute.

(3) Section 218 of the Penal Code of Alaska extends to Alaska the common law of crimes as that common law is adopted and understood in the United States, except so far as the Penal Code itself has prescribed the law of crimes.

(4) The common law, as adopted and understood in the United States, makes it a misdemeanor to solicit the commission of any felony,—either a common law or a statutory felony.

(5) The Penal Code of Alaska has made no other or different provision on the subject of solicitation to commit crime.

(6) Section 218 of the Penal Code of Alaska therefore makes it a misdemeanor to solicit a person in Alaska to furnish to any Indian there any intoxicating liquor.

(7) Alaska is not Indian country except for the purpose of preventing trafficking there in liquor with the Indians, and Indians in Alaska are uniformly responsible to the courts for all crimes committed by them exactly the same as are white people.

(8) Even in the Indian country of continental United States the Indians have uniformly, except for a period of about ten years, been held liable to the courts for furnishing liquor to other Indians and for introducing or attempting to introduce it into the Indian country. And at all times Indians soliciting the commission of crime in the Indian country were liable to the courts therefor in every jurisdiction to which the common law extended; for such solicitation is not a crime against another Indian but is a crime against the public.

(9) The treaty of 1824 with Russia and all subsequent legislation proves that the prohibition of all liquor trafficking with Indians in Alaska was made fully as much to protect the white man as to protect the Indian—indeed, the coupling of the terms "spirituous liquor," "fire-arms," and "ammunition," clearly indicates that the prohibition was pri-

marily for the benefit of the white man and only secondarily for the benefit of the Indian.

(10) Neither policy nor charity requires or permits that the Indian be exempted from liability to the courts for the crime of soliciting the commission of the felony of furnishing liquor to an Indian.

(11) Finally, when Dan Lott solicited Ford to furnish intoxicating liquor to him, Lott, he was guilty of the misdemeanor of soliciting the commission of a felony.

Respectfully submitted,

ROY V. NYE,
Assistant United States Attorney,
Territory of Alaska, First Division.
Attorney for Defendant in Error.

APPENDIX A.

In the District Court for the District of Alaska Division Number One at Ketchikan.

No. 264-KB.

UNITED STATES OF AMERICA,

vs.

DAN LOTT, Defendant.

No. 270-KB.

UNITED STATES OF AMERICA,

vs.

PETER JONES, Defendant.

DECISION OVERRULING DEMURRER.

JOHN RUSTGARD, United States Attorney, for the Government;

KAZIS KRAUCZUNAS, Esq., for the Defendants;

LYONS, District Judge:

Seven thirty p. m., May 9, 1912.

Court:

Section 218 of the Penal Code for the District of Alaska provides:

> "The Common Law of England as adopted and understood in the United States shall be in force in said District, except as modified in this Act."

It is contended on the part of the government that that section extends all of the common law relating to crimes to the District of Alaska except as the same

is modified by the Penal Code for the District of Alaska, that is, wherever the Code speaks it supersedes the comon law, but when it is silent regarding any act that was made criminal at common law such act is made criminal in Alaska by virtue of the extension of the common law to Alaska as provided in the section last quoted.

The defendant contends that Section 218 merely extends the common law to Alaska as an aid in construing the statutory law; that the only purpose of Section 218 is to extend the common law rule of interpretation to the District of Alaska.

If the defendant's contention be tenable it would seem that Section 218 is superfluous, for in the construction of statutory law or in the ascertainment of the meaning of any of the terms employed the court would look to the common law as the same has been construed by the courts without the common law actually being extended by specific legislation. The rules of interpretation which would be followed by the court in any event would be the rules adopted and adhered to by the English and the American courts. The original growth and meaning of the law and its terms must be ascertained where any doubt exists, by considering the original history and growth of the provisions of the statute as well as the language used by the legislature. In order, therefore, to give full force and effect to Section 218 it must be construed to extend the common law of England as adopted and understood in the United

States, except where the same is modified by statutory enactment, to the District of Alaska.

The defendant further contends that the complaint does not charge a crime at common law for the reason that it is not a crime to solicit or incite another to commit an offense similar to that of selling or giving intixocating liquor to natives, and counsel for the defendant has cited many cases to sustain his position which from a superficial consideration apparently support his position. It is not a crime at common law to incite another to commit a misdemeanor and some courts have held that it is not a crime at common law to incite another to commit an offense which was not a felony at common law although it may have been made a felony by statute, and some courts have taken the position that the question as to whether the crime which the defendant solicits another to commit would be a felony or a misdemeanor is not material but whether such crime is one that is considered *malum in se* or *malum prohibitum;* but it seems to the Court that the better rule is the one which holds that whoever incites another to commit a felony is guilty of an offense regardless of whether or not the same has been recognized as a felony by common law or whether the same is made a felony by statute. The Congress of the United States has seen fit to make selling or giving intoxicating liquor to natives a felony. It is, therefore, in the eyes of the legislature a serious offense and while the same might not have been considered *malum in se* at one time, the evil which resulted

from an unrestricted sale of liquor to Indians was recognized by Congress many years ago; and while at one time the same was declared to be merely a misdemeanor, the character of the offense and the dangerous consequences resulting therefrom caused the legislature to declare such an act to be a felony. If the legislature has deemed such an act to be sufficiently serious and heinous as to make the same a felony, why should the Court treat it lightly and regard it as a trivial offense and, therefore, hold that the inciting or soliciting one to commit the same is not a crime although the inciting and soliciting of one to commit a crime much less dangerous to society should be considered an infraction of the law. It would appear, therefore, that the courts should rely on the legislature to say what are serious offenses and not to have recourse to the ancient common law to determine what was at one time considered *malum in se* or *malum prohibitum*.

For these reasons it is believed that the complaint states a crime under the laws of the District of Alaska and the demurrer is therefore overruled.